

Matter of CDR Creances S.A.S. v First Hotels & Resorts Invs., Inc.

2016 NY Slip Op 30996(U)

February 29, 2016

Supreme Court, New York County

Docket Number: 150583/2014

Judge: Lawrence K. Marks

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

-----X

In the Matter of the Application of
CDR CRÉANCES S.A.S.,

Petitioner-Judgment Creditor,

-against-

Index No. 150583/2014

FIRST HOTELS & RESORTS INVESTMENTS, INC.
(a/k/a LES PREMIERS INVESTISSEMENTS
HOTELIERS & VILLEGIATURE, INC.), STEWART
TITLE INSURANCE COMPANY and UNITED
STATES OF AMERICA,

Respondents,

MAURICE COHEN, LEON COHEN, ROBERT
MARABOEUF, ALLEGRIA ACHOUR AICH,

Judgment Debtors,

for a judgment and order pursuant to Civil Practice Law
& Rules § 5225 (b).

-----X

LAWRENCE K. MARKS, J.

Respondent United States of America (“United States”) moves to dismiss the
petition against it pursuant to CPLR 3211(a)(2) and (7), based on lack of subject matter
jurisdiction and for failure to state a claim.

BACKGROUND

Petitioner brought this special proceeding, pursuant to CPLR 5225 (b), seeking to enforce a judgment it previously obtained against judgment debtors Maurice Cohen, Leon Cohen, Robert Maraboef and Allegría Achour Aich, in the amount of \$186,325,301.01 (the “Judgment Debt”), as against respondent First Hotels & Resorts Investments, Inc. (“First Hotels”). Am Petition, ¶ 1. Petitioner is seeking to pierce the corporate veil, arguing that First Hotels is the alter ego of the judgment debtors. *Id.*, ¶¶ 2-3, 148, 156. If petitioner is successful on this theory, it will seek a judgment making First Hotels jointly and severally liable for the Judgment Debt. The asset of First Hotels at issue is an escrow account being held by respondent Stewart Title Insurance Co. (“Stewart Title”) that contains \$3,995,120.71 (the “Escrow Funds”). These funds are the proceeds from the sale of an apartment located in New York County at 845 United Nations Plaza. This escrow account was established in 2011, pursuant to an order of this Court in a related action.¹ *Id.*, ¶ 8. After petitioner placed a lis pendens on the apartment as part of the related action, the property was subsequently sold, and the parties agreed to place the sale proceeds in the escrow account pending the outcome of that litigation.

The United States obtained an interest in the Escrow Funds based on taxes First Hotels owes to the Canada Revenue Agency (“Canada Revenue”), the Canadian taxing

¹ The related action is *CDR Créances, S.A.S. v. First Hotels & Resorts Investments, Inc.*, Index No. 650084/2009.

authority. Mot Br at 2. Canada Revenue sought help from the IRS to collect those taxes, pursuant to the United States-Canada Income Tax Convention.² On February 22, 2010, the IRS served a notice of federal tax lien on First Hotels (“IRS Lien”) in the amount of \$3,740,050.88, which was filed on February 23, 2010 with the Office of the City Registrar of the City of New York in New York County. 5/14/15 Barnea Aff, ¶ 2 and Exh. 1. On April 20, 2010, the IRS served a notice of levy³ on Stewart Title, in the amount of \$35,185,573.36, in an attempt to collect the Escrow Funds. Am Petition, Exh A. On June 3, 2010, the IRS, upon learning of the related action, notified Stewart Title by letter that it may “suspend compliance with the notice of levy until the litigation is complete.” Barnea Aff, Exh 2. On March 17, 2014, the IRS issued an amended notice of levy to Stewart Title in the amount of \$3,740,050.88; this amended one assessment number in the notice, but left the total amount due the same. Barnea Aff, Exh 3. On that same date, the IRS again notified Stewart Title that it may “suspend compliance with the notice of levy” until the conclusion of the related action as well as the instant proceeding. Barnea Aff, Exh 4.

The United States now moves to dismiss on several grounds. It argues that this Court lacks subject matter jurisdiction over petitioner’s claim, challenging the notice of

² United States-Canada Income Tax Convention of Aug. 16, 1984, as amended, Treaty Doc. 104-4 (1995) (1984 WL 261890, Article XXVI A).

³ A lien is a legal claim against property to secure payment of a debt; a levy actually takes the property to satisfy the debt.

levy served and filed by the IRS under 26 USC § 7426(a)(1). The United States also contends that petitioner's claims against it are not ripe for judicial review. It further asserts that even if there is jurisdiction, petitioner fails to state a claim because the government's federal tax lien is superior to any potential claim petitioner may have in the Escrow Funds.

DISCUSSION

Despite the fact that there are related actions in this Court, and the fact that there are efficiencies to having related proceedings kept together, the motion to dismiss is granted.

This Court lacks subject matter jurisdiction over petitioner's claim against the United States because such claim must be brought in federal district court. Under 26 USC § 7426(a)(1), if the IRS levies on a third-party's property to collect taxes owed by a different party, the third-party may bring an action against the United States for wrongful levy.

If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

26 U.S.C. § 7426(a)(1). This statute makes it clear that any challenges brought against an IRS levy may be brought in a federal district court. *Id.* See also *EC Term of Years Trust v. United States*, 550 U.S. 429, 433-34 (2007); *Stapleton v. Two Million Four Hundred Thirty-Eight Thousand, One Hundred and Ten Dollars*, 454 F.2d 1210, 1217 (3d Cir.), *cert denied* 409 U.S. 894 (1972); 28 U.S.C. § 1346(e) (“the [federal] district courts shall have original jurisdiction of any civil action against the United States provided in section . . . 7426 . . . of the Internal Revenue Code of 1986”).

Petitioner argues that its challenge is not to the IRS levy itself but, rather, is an action to quiet title pursuant to 28 USC § 2410. This is unavailing. That statute grants jurisdiction to both federal and state courts to resolve property claims where the United States has a lien. However, it only addresses property subject to a lien, not a levy. Such quiet title actions are not permitted where a remedy is available pursuant to 26 USC § 7426(a)(1). *Fidelity and Deposit Co. of Maryland v. Adelanto*, 87 F.3d 334, 335 (9th Cir. 1996). Section 7426(a)(1) is the exclusive remedy for a claim by a third-party to property subject to both the third party’s lien and the government’s levy, but physically possessed by the taxpayer. *EC Term of Years Trust v. United States*, 550 U.S. at 433-34; *Williams v. United States*, 947 F.2d 37, 39 (2d Cir. 1991), *cert. denied* 504 U.S. 942 (1992).

This action is also dismissed on the ground that petitioner’s claim is not ripe, or choate. To be choate, the “identity of the lienor, the property subject to the lien and the amount of the lien,” must be established. *Don King Prods., Inc. v. Thomas*, 945 F.2d 529,

533 (2d Cir. 1991) (internal citation omitted). It must be “specific and perfected,” which is when “there is nothing more to be done.” *United States v. Equitable Life Assur. Socy. of U.S.*, 384 U.S. 323, 327 (1966).

A party, like petitioner, holding a provisional remedy, such as a *lis pendens* or a judicially created escrow, does not have a choate interest in the property until its interest is reduced to, and docketed as, a final judgment, and execution is issued. *Loadstar Mortgage Servs., LLC v. Barker*, 282 Fed Appx 572, 573-74 (9th Cir. 2008) (*lis pendens* inchoate until court adjudged that property belonged to party, and the specific value to which the party was entitled). *See also Schaeffer v. Gordon*, 2015 WL 1815678, *5 [Sup Ct, NY County April 16, 2015] (stating that there must be an examination of two factors: chronological priority and “compliance with the doctrine of choateness”); *Board of Mgrs. of 141 Condominium v Pickett*, 159 Misc.2d 1076, 607 N.Y.S.2d 565, 567 (Sup Ct, NY County, 1994) (a “lien which has not been reduced to judgment is not definite in amount and is, therefore, inchoate”). Since, in the instant case, petitioner has not obtained a final judgment against First Hotels and has an inchoate interest, its claims requiring a choate interest are not yet ripe.

The priority of federal tax liens is determined by federal law. *Matter of Mintz v. Fischer*, 19 A.D.2d 36, 39 (1st Dep’t 1963); *Schaeffer v. Gordon*, 2015 WL 1815678, * 5. *See also North Am. Corp. v. Datacap Int’l.*, 54 A.D.2d 708, 708-09 (2d Dep’t 1976). In order for a creditor to challenge the priority of a federal tax lien, it must hold a choate

interest in the property that is the subject of the lien. *United States v. Security Trust & Sav. Bank of San Diego*, 340 U.S. 47, 50 (1950) (federal tax lien had priority over inchoate attachment lien that had not ripened into a judgment). *See also American Ins. Co. v. N.Y.C. Health & Hosps. Corp.*, 265 F. Supp 2d 434, 438 (S.D.N.Y. 2003) (“As against a federal tax lien, a state lien can take priority only if, in addition to being first in time, it is choate, or fully established, before the federal lien attaches”); *Board of Mgrs. of 141 Condominium v. Pickett*, 607 N.Y.S.2d at 567 (“[W]hether a federal tax lien has priority over a lien created by state law depends on which lien was perfected first, which, in turn, depends on when the competing state lien became ‘choate.’”).

A levy under section 7426 is a provisional remedy. It does not determine whether the IRS’s rights to the property seized are superior to other claimants. Rather, it simply protects the IRS against loss or diversion while the seniority of liens is being resolved. *United States v. National Bank of Commerce*, 472 U.S. 713, 721 (1985). The rationale for the levy is the need for the government, through the IRS, to promptly secure its revenues. *Id.* The notice of the levy under section 7426 “gives the IRS the right to all property levied upon and creates a custodial relationship between the person holding the property and the IRS so that the property comes into the constructive possession of the Government” until final judgment is entered. *Id.* at 720 (internal citations omitted).

Here, petitioner’s claim is a challenge to the IRS’s notice of levy on Stewart Title, dated April 20, 2010, in its attempt to collect the Escrow Funds based on taxes that First

Hotels owes to the Canada Revenue Agency. It states, in the amended petition, that “the United States is named as respondent because it has served the Notice of Levy on the funds held in escrow by Stewart Title Insurance Company. . . . The lien asserted by the United States is inferior to the rights of petitioner because it was served after the order placing the proceeds of the sale in escrow.” Am Petition, ¶ 9. Petitioner argues that it is not challenging the levy itself, but rather is asserting that its claim to the Escrow Funds is higher in priority than the IRS’s claim. However, the “priority of interests in the seized property is determined in a Section 7426 wrongful levy action after the levy is executed.” *Austin and Laurato, P.A. v. United States*, 539 Fed Appx 957, 960 (11th Cir. 2013) (internal citations omitted), *cert denied* 134 S.Ct. 1311 (2014). Only after petitioner obtains a judgment, that is docketed and execution is issued, can the issue of the respective priorities of petitioner’s judgment lien and the IRS’s federal tax lien, or any other lien, be determined. Moreover, this challenge to the IRS’s levy can only be brought pursuant to 26 USC § 7426(a)(1), which must be brought in federal court.

Accordingly, it is

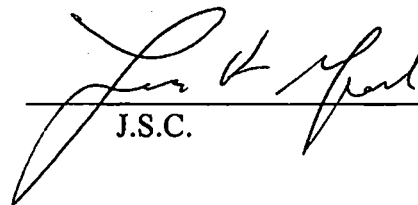
ORDERED that the motion of respondent the United States of America is granted, and that portion of the petition that relates to this respondent is dismissed, without

prejudice; and it is further

ORDERED that the remainder of the action shall continue.

Dated: February 29, 2016

ENTER:



A handwritten signature in cursive script, appearing to read "Lawrence K. Marks", is written over a horizontal line. Below the line, the initials "J.S.C." are printed.

HON. LAWRENCE K. MARKS